ALBERTA ADVISORY COUNCIL ON WOMEN'S ISSUES

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WOMEN AND THE PROCESS OF CONSTITUTIONAL REFORM

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A Discussion Paper Prepared For The
Alberta Advisory Council on
Women's Issues

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ADVISORY
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ON
WOMEN'S
ISSUES

The issue of constitutional reform and women's participation in this process became a priority for members of the Council's Legal committee in 1990. The Alberta Advisory Council on Women's Issues determined that the best way the Council could assist and encourage women to become involved in the constitutional discussion process was by providing a tangible starting place. **Women and the Process of Constitutional Reform**, this discussion paper written for the Council by Professor Anne McLellan of the University of Alberta's Faculty of Law, provides just that. It is a starting place, a document to be used by individual women and women's groups to assist them in preparing their own submissions to either the provincial special committee or the federal citizen's forum, or both.

The members of the Legal Committee of the Alberta Advisory Council on Women's Issues which commissioned the document are

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The Alberta Advisory Council on Women's Issues was established in 1986. Its mandate is to work toward the full and equal participation of women in the life of the province by identifying issues of concern to women and making recommendations on these issues to the Government of Alberta.

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EXECUTIVE SUMMARY

Constitution-making is like no other political or legal act; it is a process of self-definition and self-realization, which forces us to reflect upon who we are and to articulate what we are about. It causes us to engage each other in debate over the values and beliefs which we believe to be fundamental. It requires us to reach a consensus on those values and beliefs which we would expect to see entrenched in our *Constitution* as an enduring statement of our community.

Most women seek the means and the opportunity to achieve real equality within Canadian society. An important starting point for women will be to ensure that their voices are heard in these constitutional discussions, that their experiences are understood by other participants and that their expectations are accorded a respectful and responsive hearing. To better prepare women in Alberta for participation in the upcoming constitutional reform process, this discussion paper places the present constitutional situation in its historical perspective; describes the significance of the current constitutional negotiations for women; and provides an opportunity for Alberta women to reflect upon the ways in which they can participate in this important round of constitutional negotiations.

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The history of women's involvement in constitution-making is a story of the "recent past." Women did not become fully aware of the importance of constitutional reform to their lives until the late 1970's. Since that time, women have participated in two significant constitutional events; the adoption of the *Constitution Act, 1982* which included the *Charter of Rights and Freedoms*; and the Meech Lake Accord. Women took feelings of hope, pride and empowerment from their success during the constitutional reform process of 1980-82. Women became "rights bearers." They achieved a constitutional identity, which guaranteed them a means by which to seek equal status, rights and benefits within Canadian society. Women, of course did not view the adoption of the *Charter of Rights* as the end of their struggle for equality. Indeed, most women viewed it as an important beginning; they were now the possessors of powerful means by which to assert their claims to equality. These feelings of inclusion, of recognition and empowerment, were put in jeopardy by the Meech Lake Accord. Like others, women were concerned not only about the substance of the Accord, but the process by which it was reached. Women's concerns with the substance of the Meech Lake Accord were not generated on the basis of anti-Québec sentiment or bias, but on the basis of serious and legitimate concerns about the Accord's possible effect on the means available to women by which to achieve equality.

Women must now be ready to participate in the upcoming constitutional negotiations, as it is predicted that these negotiations will be the most comprehensive and far reaching since Canada's creation in 1867. Women in Alberta musts appreciate the significance of these negotiations for their daily lives. The following are among the issues likely to be discussed in constitutional negotiations:

- the power to create and establish standards for national shared cost programs, such as health care;
- the responsibility for post-secondary education
- amendments to the *Charter of Rights and Freedoms*
- redefinition of important federal institutions such as the Senate and the Supreme Court of Canada; and
- the process by which constitutional change will take place; e.g. public hearings, referenda, constituent assemblies.

The process of constitution-making upon which Canadians are embarking is one of singular importance. The threat to the continued existence of Canada is real. Fundamental changes in our federal system of government are now inevitable. Canadians must begin a conversation with each other, and their political leaders, as to the meaning of Canada and the nature of its fundamental values. This task will require tolerance, patience, good will, generosity, and an open mind. Women must be prepared to participate fully in this conversation.

CHAPTER I

INTRODUCTION

Once again, Canadians find themselves enmeshed in a complex and emotional debate about their constitution. This debate involves more than Canada's future as a legal and political entity. Its resolution will have profound implications for the nature and quality of individual lives.

Constitution-making is like no other political or legal act; it is a process of self-definition and self-realization which forces us to reflect upon who we are and to articulate what we are about. It causes us to engage each other in debate over the values and beliefs which we believe to be fundamental. It requires us to reach a consensus on those values and beliefs which we would expect to see entrenched in our *Constitution* as an enduring statement of our community.

Too often, constitution-making has been thought of as a specialized exercise in "high politics," removed from the challenges and realities of everyday living, and reserved for the expertise of politicians, political scientists and constitutional lawyers. Such a view denies the involvement of ordinary Canadians and discounts their contributions to the constitutional enterprise. No view could be more wrong. The constitutional enterprise compels us to define our fundamental values and beliefs in light of our experience and concern for others. It requires the participation of all Canadians. The delegation of this task to others, with perceived expertise, is an abdication of responsibility which will guarantee that many concerns will be ignored, misunderstood or misconstrued.

It may be asked whether there is a unique role for women to play in the constitution-making process. Is there something qualitatively different in the perspectives and concerns of women, which they can bring to this process? In this time of crisis for our country, should we be asserting claims as "women," rather than simply participating as concerned citizens? It is true that in relation to some issues, such as official languages, there is probably no unique position held by women by virtue of their being "women." One supports bilingualism or not, for a variety of economic, political and cultural reasons, none of which would seem to have a uniquely female dimension.

However, in relation to many other issues on the current constitutional agenda, it is possible to identify aspects thereof which are of unique relevance and concern to women. This is due to the realities of women's lives: women are often in a weaker economic position than men; women are often at risk as the victims of sexual violence and physical abuse; women continue to be the primary care givers in most families; women are excluded from full participation in many occupations and professions through systemic discrimination; and women continue to lack an effective political voice.

In referring to "women" in this discussion paper, the author is mindful that women are not homogeneous, either in their political philosophies or in their views on constitutional reform. Within the 52% of the population who are women, one will find support for a wide variety of political, social and economic agendas. This makes it difficult for any one group or association to claim to speak on behalf of "women." Such a claim is always open to challenge by those women who disagree with the opinions being advanced. It is important that women's organizations be sensitive to the realities of representation and not make claims that suggest they speak for all women or

that women themselves have a unified or single voice, or agenda.

Women and men will speak with different voices in the upcoming constitutional discussions because they possess many identities. A women may be; an Albertan, an aboriginal, an Anglophone, a Francophone, a "new" Canadian, white, black, a mother, differently abled, married, single, widowed, divorced, wealthy, poor, or an urban or rural resident. The positions taken by women in relation to constitutional reform will depend upon which of their various identities are engaged in this context. For example, a woman, who is single parent, might have concerns about the imposition of limitations upon the federal Parliament's ability to establish national shared-cost programmes, like medicare and universal daycare, appreciating the importance of these services for the well-being of her family; however, she may conclude, as an Albertan, that it is important for the province to have greater autonomy and to have the ability to establish its own fiscal and social programming priorities. A diversity of opinions on Canada's constitutional future is to be expected and should be respected.

Nevertheless, most women seek the means and the opportunity to achieve real equality within Canadian society. An important starting point for women will be to ensure that their voices are heard in these constitutional discussions, that their experiences are understood by other participants and that their expectations are accorded a respectful and responsive hearing.

To better prepare women in Alberta for participation in the constitutional enterprise, this brief is designed to:

1. Consider the constitutional situation in its historical perspective;
2. Make women aware of the significance of the current constitutional negotiations;
3. Provide the opportunity for the women of Alberta to reflect upon the ways in which they can participate in this important round of constitutional negotiations.

CHAPTER II

HISTORICAL BACKGROUND

The history of women's involvement in constitution-making is a story of the "recent past".[1] Women did not become fully aware of the importance of constitutional reform to their lives until the late 1970s. The catalyst for this awareness was the federal government's renewed commitment to achieving significant constitutional change, including the patriation of the constitution, the adoption of an amending formula, and the entrenchment of a charter of rights.[2] In the fall of 1978, the First Ministers produced a list of 14 items on which constitutional negotiations were to proceed. One of those items was family law and, in particular, discussions centered upon the proposal that Parliament would relinquish to the provinces exclusive legislative power over divorce and related matters. This proposal became an early focal point of women's involvement in the constitution-making process.[3]

Later, in 1980, when it became apparent that the federal

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[1] This is not to ignore the significant efforts of early feminists to achieve political equality. For example, the result of the *Persons'* case was to provide women with the opportunity to sit in the Senate. Until the Judicial Committee of the Privy Council interpreted the work "persons" in s.24 of the *Constitution Act, 1867* to include women, the opinion of the federal government had been that "persons" referred only to male persons. See for a brief discussion of this case and its significance: McLellan, "Legal Implications of the Persons Case" (1989) 1 Const. Forum 11. Further, the Women's Suffrage Movement in Alberta, begun in 1909, gained for women the right to vote and sit in the legislature in 1916. Albertans celebrated the 75th anniversary of that achievement on April 19th of this year.

[2] After the failure of the 1971 Victoria Constitutional Conference, there were no constitutional negotiations until March 1976 when Prime Minister Trudeau wrote to the provincial premiers, suggesting a new package of constitutional reforms. The impetus for this initiative appears to have been the fear of growing Québec nationalism.

[3] Provincial and federal officials proposed significant reforms in the area, including making divorce a shared jurisdiction between federal and provincial governments. Women were not consulted on these proposals and when their implications became known, groups like the Manitoba Advisory Council on the Status of Women began to make their concerns known to the Premiers.

government was going to proceed unilaterally with a package of constitutional reforms, which included a charter of rights, women identified this to be the critical point in their campaign to secure a constitutionally guaranteed right of gender equality. Women, and women's organizations, appeared before the Special Joint Parliamentary Committee of the Senate and the House of Commons on the *Constitution*,[4] arguing for an unequivocal and comprehensive guarantee of equality in the *Charter*. Consistent with this, they argued against a "notwithstanding"[5] clause and a "reasonable limits"[6] clause, the purpose of which were to accommodate strongly held traditions of parliamentary supremacy and majority rule in the proposed, new constitutional structure. These traditions could lead to legislative limitations being imposed upon guarantees of gender equality.

The Special Joint Committee was persuaded, by these submissions and others, to recommend changes to certain provisions in the federal government's proposed constitutional reform package, when it reported in February of 1981.[7] In addition, after intensive lobbying by women,

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[4] The Committee commenced sitting November 6, 1980 and by February 2, 1981 had received written submissions from 914 individuals and 294 groups. 104 individuals or groups appeared as witnesses, including the Canadian Advisory Council on the Status of Women, and the National Association of Women and the Law, the National Action Committee on the Status of Women and the Native Women's Association of Canada.

[5] The effect of such a clause is to permit a legislature to override a guaranteed right. See: *infra* n.10 for the text of s.33, the override clause included in the *Constitution Act, 1982*

[6] The original version of s.1, the reasonable limits clause, as proposed in a Resolution Tabled in the House of Commons and Senate on October 6, 1980 read:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such limits as are generally accepted in a free and democratic society with a parliamentary system of government.

[7] Set out on the next page in the right-hand column are the changes proposed by the Committee, and subsequently adopted by Parliament. For the purpose of comparison, the relevant sections of the Government's October 6, 1980 proposal are also included in the left-hand column.

the Minister of Justice recommended to Parliament in April, 1981, that a section guaranteeing the principle of gender equality be included.[8] However, when the First Ministers, meeting in Ottawa, in November 1981, finally announced their agreement "on a deal," after all night meetings, women discovered, to their dismay, that the equality provisions, among others, were subject to a

Proposed Resolution - as of October 6, 1980	Amendments Proposed by the Special Joint Committee
1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.	The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
Non-discrimination Rights	Equality Rights
15.(1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex	15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex or age.
(2) This section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.	(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals of groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex or age.

(Taken from Bayefsky, Anne F., Canada's Constitution Act 1982 and Amendments, Vol. II (McGraw-Hill Reyerson Ltd., 1989).

[8] This was s.28, which read:

> "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

The inclusion of this clause was a result of the efforts of the Ad Hoc Women's Committee on the Constitution, which was formed quickly in February 1981 to fill a vacuum left by the CACSW, when its President, Doris Anderson, resigned due to pressures from the federal government not to proceed with a planned conference on Women and the Constitution. The Ad Hoc Committee organized a new conference from which came the impetus to lobby the federal government for the inclusion of a clear statement on gender equality.

notwithstanding clause, the effect of which was to permit the federal Parliament or provincial legislatures to override the rights guaranteed elsewhere in the *Charter*.[9] Prime Minister Trudeau made it clear that the notwithstanding clause was reluctantly included as the price to be paid for provincial consent to the proposed package of reforms.

Women began another round of intense lobbying which continued until the Prime Minister and provincial Premiers agreed to amend s.28, removing any reference to s.33.[10] It was hoped this would have the effect of deflecting the force of the override clause, as it related to the guarantee of gender equality. While it is unclear that s.28 will be interpreted to have such an effect by the courts,[11] the symbolic importance of its inclusion to women cannot be underestimated. The sense of betrayal and outrage felt by many women after s.28 was "tampered with" by the First Ministers, led to a "coming together" to not only condemn the perceived opportunism of our political leaders but also to overcome it. The change agreed to by the First Ministers in relation to s.28 signalled the success of this political action and it is now viewed by women as an empowering event of singular importance.[12]

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9 Section 28, as agreed to by the First Ministers on November 5, 1981 read: "Notwithstanding anything in this Charter except section 33, the rights and freedoms referred to in it are guaranteed equally to male and female person." [emphasis added]

10 Section 33(1) read: Parliament or the legislature of a province may expressly declare in an Act of Parliament or the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in s.2 or ss.7 to 15 of this Charter

11 There has been little judicial comment upon the meaning of s.28. However, it does make the principle of gender equality an important constitutional norm. However, section 28 probably does not make gender discrimination subject to a higher degree of judicial scrutiny than other forms of prohibited discrimination. See generally, deJong, Katherine,J.,M "Sexual Equality: Interpreting Section 28" in Bayefsky and Eberts eds., Equality Rights and the Canadian Charter of Rights and Freedoms (Carswell, 1985) 493.

12 These events have been described in the following terms:

> "That victory (having s.28 reinstated without the s.33 override)

Women took feelings of hope, pride and empowerment from their success during the constitutional reform process of 1980-82. Women became "rights bearers." They achieved a constitutional identity, which guaranteed them a means by which to seek equal status, rights and benefits within Canadian society.

Women, of course did not view the adoption of the *Charter of Rights on April 17, 1982* as the end of their struggle for equality.[13] Indeed, most women viewed it as an important beginning; they were now the possessors of powerful means by which to assert their claims to equality.

These feelings of inclusion, of recognition and political power, were put in jeopardy by the Meech Lake Accord. Like others, women were concerned not only about the substance of the Accord but the process by which it was reached. The Accord represented "executive federalism"[14] at its worst; an agreement reached in secrecy among our political leaders who presented us with a *fait accompli*. This process betrayed expectations

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plays a role in the mythology of the women's movement similar to the victorious past battles for the inheritors of a military tradition. Feminist activists see s.28 not as something granted to women or as the automatic and logical application of a principle to women, but rather as something seized, in away akin to a trophy. Thus the language of the women's movement tends to describe s.28 as being possessed by women, or as a beachhead occupied by women in a not all together friendly land." Cairns, A. "Citizens (Outsiders) and Government ((Insiders) in Constitution-Making: The Case of Meech Lake" (1988) XIV Canadian Public Policy 121.

13 In fact, the s.15 guarantee of equality did not come into effect until April 17, 1985. During this time, governments were to review their laws and policies to determine which might violate s.15. Some provinces took this task more seriously than others. For a criticism of the review process undertaken in Saskatchewan see: Skrofel, S., "Equality Rights and the Law Reform in Saskatchewan: An Assessment of the Charter Compliance Process" (1985) 1 C.J.W.L. 108.

14 Defined as inter-governmental decision-making between the executives of the federal and provincial levels of government, the Prime Minister and Premiers being the most important and visible members of their respective executives.

created in 1982. In 1982, for the first time, Canadians had participated in the making of a constitution. Not surprisingly, most liked being included; most appreciated the opportunity, even if they chose not to exercise it, to offer their opinions and insights as to what the new constitution should say. Some suggest that the events of 1982 have changed forever the way we in Canada will reform our *Constitution* in the future. This process created expectations, not only on the part of women, but also on the part of other historically disadvantaged and excluded groups, that their opinions would be sought before further constitutional change took place.[15]

The Meech Lake Accord grew out of a deep desire on the part of our political leaders to have Québec "resume a full role in the constitutional councils of Canada".[16] It is to be remembered that Québec did not sign the *Constitution Act, 1982*.[17] It was the hope of many that, with the adoption of the Meech Lake Accord, which recognized Québec as a distinct society,

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15 Cairns, *supra*, n.12, 139-1401.

> The bitterness and passion that inform the presentations of the numerous groups objecting to the Accord are not based on a narrow instrumental calculation of its effects on the future flow of material benefits. Their anger is not driven by the fear of tangible gains foregone, but by a more complex battery of emotions. The representatives of women's groups, of aboriginals, of visible minorities, of supporters of multiculturalism, along with northerners and basic defenders of the Charter employ the vocabulary of personal group identity, of being treated as an outsider, of being treated with respect as a worthy participant or being cast into the audience as a spectator as one's fate is being decided by others.

16 From: Motion for a Resolution to Authorize an Amendment to the Constitution of Canada. The negotiations that lead to the Accord are often referred to as the "Québec Round." However, all provinces would have gained power at the expense of the federal government had the Meech Lake Accord been ratified.

17 Québec did not sign the Act for a number of reasons, including the lack of a veto for the province over future constitutional amendments. In addition, there was deep personal antipathy between Prime Minister Trudeau and Premier René Levesque, based in part upon their different visions of Québec's future. During the Québec Referendum in 1980, Prime Minister Trudeau had promised Québecers a new constitutional deal. Ironically, the *Constitution Act, 1982*, which was never signed by Québec, was to fulfill that promise.

Québec would feel secure about its unique place within the Canadian political structure. Women did not disagree with this objective. Indeed, women's organizations went out of their way to reassure Québec that their objections to the Accord were in no way motivated by an anti-Québec sentiment. The Canadian Advisory Council on the Status of Women began its brief to the Special Joint Committee of the Senate and House of Commons (1987) with the following words:[18]

> The Canadian Advisory Council on the Status of Women is honoured to join with other Canadians in welcoming Québec as a full partner in the Canadian Constitution, and in formally recognizing that Québec is a distinct society within Canada.

However, women[19] had two main concerns with the Meech Lake Accord: (1) the process by which it had come about, and; (2) its substance, as it might effect women's continuing struggle for equality.

The process, was based upon the time honoured, if bankrupt, concept of "executive federalism". The eleven First Ministers met in virtual secrecy, aided only by a handful of their most trusted and senior advisors. A deal was concluded about which Canadians were told that whatever their concerns, only corrections for egregious errors would be accepted. Unlike the constitutional agreement of 1982 for which there had been many proposed drafts, both federal and provincial, beginning in 1978, there was little advance notice or discussion of those subjects which formed the substance of the

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18 Other women's groups which endorsed recognition of Québec as a "distinct society" included the Nation Association of Women and the Law (NAWL) and the National Action Committee on the Status of Women (NAC).

19 The women of Québec supported the Meech Lake Accord, thereby creating significant tensions within the national women's movement. This is an example of the reality that "women" have many identities. For the Francophone women of Québec, that which was of prime importance to them was their province's claim for constitutional recognition as a distinct society.
The Fédération des Femmes du Québec did voice objections to the Accord, in relation to the spending power and the lack of definition for "distinct society." However they did not believe that the phrase imperilled equality rights for women.

Meech Lake Accord.[20]

The final form of the Accord was agreed to by the First Ministers on June 3, 1987. A Special Joint Committee of the Senate and House of Commons was created later in June to receive submissions from the public. Its hearings began in August, and it heard from 131 witnesses in a period of 5 1/2 weeks. It received written submissions from a total of 301 persons or groups. The Committee only met in Ottawa but did pay the expenses of those witnesses who so requested.[21]

It might be suggested that this process of public consultation was one undertaken in unseemly haste. Little time was provided to groups to prepare briefs, and little effort was expended by the federal government to provide full information to the public about the nature of the Accord and its implications. Further, the summer months were clearly not the most convenient time for voluntary organizations to mobilize their membership to action. A certain amount of scepticism about the commitment of the federal government to a process of public participation was warranted. Indeed, the process was later described in much harsher terms; for example, "abusive", "anti-democratic process", "dishonourable", "shameful", immoral", and "selfish".[22]

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20 The substance of the Meech Lake Accord was anticipated in a speech by Gil Remillard, Québec Minister of Intergovernmental Affairs, delivered at a seminar held at Mont-Gabriel, Québec, on May 9 1986. In it he outlined Québec's conditions for signing the *Constitution Act, 1982*. They were:

1. Explicit recognition of Québec as a distinct society;
2. Guarantee of increased powers in matters of immigration;
3. Limitation on the federal spending power;
4. Recognition of a right of veto;
5. Québec's participation in appointing judges to the Supreme Court of Canada.

21 Among the women's organizations which appeared were: National Association of Women and the Law (NAWL), Legal Education and Action Fund (LEAF), Canadian Advisory Council on Women's Issues (CACSW), Ad Hoc Committee of Women on the Constitution, Canadian Day Care Advocacy Association, the Federation des Femme des Québec and the Québec Status of Women Council.

22 Cairns, *supra*, n. 12 at 126

In Alberta, a resolution ratifying the Meech Lake Accord was passed by the Legislature on December 7, 1987. No formal hearings were held on the Accord; rather, individual MLAs were encouraged to hold meetings in their constituencies to discuss the Accord and its implications. It appears that most of these meetings were poorly attended and generated little public interest or input. The Official Opposition organized province-wide hearings and reported its findings in November, 1987.

By late 1988, the House of Commons and eight provinces had ratified the Meech Lake Accord; the consent of all ten provinces was required. Five provinces held no formal public hearings -- Saskatchewan, Nova Scotia, British Columbia, Alberta and Newfoundland. Five provinces held hearings - Québec, Prince Edward Island, New Brunswick, Ontario and Manitoba. The most extensive hearings were those held in Manitoba, New Brunswick and Ontario, where significant grass-roots opposition to the Accord became apparent. Manitoba and New Brunswick both called for amendments to the Accord to deal with some of these concerns, including those of women and aboriginal peoples.[23]

A final federal consultative process was created in March, 1990 by the Prime Minister when it was clear that the Accord was likely to fail. He created a special committee to study a Proposed Companion Resolution to the Meech Lake Accord, developed by New Brunswick. This Committee, known as the Charest Committee, reported in May 1990 after having travelled to Yellowknife, Whitehorse, Vancouver, Winnipeg, St. John's and Ottawa and after hearing from 160 witnesses and receiving 800 written submissions. It recommended no

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[23] For an overview of the Meech Lake consultative process, as well as a detailed discussion of the Manitoba Task Force see: Brock, K.L., *A Mandate Fulfulled: Constitutional Reform and the Manitoba Task Force on Meech Lake*, A project sponsored by the University of Manitoba Outreach Fund, December 1990.

significant changes to the Accord.

In relation to the substance of the Accord, many women feared that it would undermine or limit their hard won equality rights. Of particular concern was the Accord's recognition of Québec as a distinct society.[24] What effect would this recognition have on the status of *Charter* guaranteed rights and freedoms? At a minimum, it would be a factor to be considered by the courts in deciding whether a limitation on a guaranteed right was a reasonable one, demonstrably justified in a free and democratic society. Women feared that this might permit laws to be upheld in Québec, especially in the family and employment law areas, which could limit women's equality claims.[25] Women also feared that the effect of such decisions could not be confined to Québec in that they would create precedents which might influence the resolution of similar issues in the rest of Canada.

In addition, the Accord included a provision, s.16, which clarified the effect of the distinct society clause on those sections of the *Charter* dealing with aboriginal peoples and multiculturalism.[26] Women feared that the effect

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24 The "distinct society" clause stated in part:

> 2(1) The Constitution shall be interpreted in a manner consistent with
>
> (b) the recognition that Québec constitutes within Canada a distinct society.
>
> (3) The role of the legislature and Government of Québec to preserve and promote the distinct identity of Québec referred to in paragraph 1(b) is affirmed.

25 For example, NAWL suggested that the area of population control could provide examples of the potential conflict between the equality claims of women and the distinct society clause. They suggested that there was much historical evidence of government misuse of population control "in the name of preserving or promoting distinct populations;" e.g., restricting reproductive freedom, as in making abortion available only if a woman already had five children or more; altering access to availability of education and economic opportunities for women and making or taking away parental benefits, specifically maternity benefits. (Brief to the Special Joint Committee, 33rd Parl. Sess. 2, Issue No. 2A:44 at 53.)

26 Section 16 stated: "Nothing in Section 2 of the Constitution Act, 1867 affects section

of this section, which made it plain that the distinct society clause did not affect those provisions dealing with aboriginal peoples or multiculturalism, would create a "hierarchy" of rights. The guarantee of gender equality, which was not mentioned in s.16, might have less formal constitutional recognition and protection than those subjects identified in the section.[27]

Further, women had grave fears concerning s.7 of the Accord which appeared to place limitations upon the federal spending power. It must be remembered that the federal spending power has been used to fund many programmes and initiatives of singular significance to women; for example, medicare, post-secondary education, and a wide variety of social welfare programmes, including support for public housing, shelters for battered women, child care, job training and support for the disabled and elderly.[28] It was feared by some that s.7 of the Accord would limit the ability of the federal government to establish shared-cost programmes with uniform national standards.[29] The provision, which permitted provincial governments to "opt out" of national shared-cost programmes, if they carried on a programme or initiative that was compatible with national objectives, could lead to

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25 or 27 of the *Canadian Charter of Rights and Freedoms*, section 35 of the *Constitution Act, 1982* or class 24 of Section 91 of the *Constitution Act, 1867*.

[27]A number of women's groups suggested that an amendment to s. 16 was required, which would add s. 28 of the Charter to its exemptions. However, the Special Joint Committee rejected this suggestion. See Chapter VI of its Report, "The 1987 Accord and Charter Rights" 33rd. Parl. Sess. 2, issue No. 17 at 55.

[28]The three major existing shared-cost programmes are: (1) the post-secondary education financing programme; (2) the insured health programme; and (3) the Canada Assistance Plan. These programmes may be conditional or unconditional; for example, a province's receipt of funding from the federal government under the health care programme is conditional upon a province ensuring: universality, accessibility, portability and comprehensiveness. The federal government threatened to withhold payments from provinces which permitted "extra billing" by doctors, as such a practice would undermine the condition of accessibility. No provinces now allow "extra billing."

[29]It has been suggested that the real threat to the creation of new, national shared-cost programmes, and indeed existing programmes, is not constitutional reform but the deficit and a lack of economic resources on the part of the federal government.

unacceptable provincial variations in coverage and accessibility. Many feared the provision would erode the right of all to have access to similar programmes on similar terms, regardless of where they lived in Canada.

The Special Joint Committee, in its final report, minimized these concerns. While recognizing that the proposed section had "the potential for creating elements of a checkerboard of social programs across Canada," the Committee believed that such an effect could be tolerated and, to some extent, should perhaps be encouraged:[30]

> "...all provinces and all Canadians may stand to benefit from local experimentation. What should not be countenanced is a checkerboard Canada on fundamental aspects of national shared-cost programs."

However, it is suggested that an unacceptable level of ambiguity existed within section 7. For example: what is a "national shared-cost program?" when does one know if a provincial program is compatible with national objectives? are national objectives synonymous with national standards?

Some of these concerns could have been accommodated by including a definition of "national objectives." The National Association of Women and the Law recommended to the Special Joint Committee that the criteria currently found in the *Canada Health Act* be included in s.7 as a definition of "national objectives." These criteria are: (1) public administration on a non-profit basis; (2) comprehensiveness; (3) universality; (4) portability; (5) accessibility on uniform terms and conditions; (6) provision of information on the operation of the programme. Further, provincially established programmes, for which provinces received federal compensation could be subject to

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[30]**Report of the Special Joint Committee, Chapter VII, "The Federal Spending Power", 33rd Parl., Sess. 2, Issue No. 17, 76-77.**

review by the federal government to ensure general compliance with established national objectives.

It is clear that women's concerns with the substance of the Meech Lake Accord were not generated on the basis of anti-Québec sentiment or bias, but on the basis of serious and legitimate concerns about the Accord's possible effect on the means available to women by which to achieve equality.[31]

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[31]In a most unfair and unnecessarily divisive strategy, groups opposed to the Accord were often labelled "anti-Québec" by both federal and Québec government officials. While some of the opposition to the Accord existed because of such feelings, groups such as the CACSW had well researched and cogent concerns about the Accord's possible effects on women.

CHAPTER III

THE AFTERMATH OF MEECH LAKE - MORE CONSTITUTIONAL NEGOTIATIONS

Almost a year after the failure of the Meech Lake Accord, we are in the midst of the most important constitutional negotiations in our country's history. Numerous committees have been created to solicit the public's opinion on the future of Canada. Our political leaders are not likely to repeat the mistakes of executive federalism and recommend sweeping constitutional change without first consulting widely with the public.

In Alberta, the Constitutional Reform Task Force of Alberta (the Horsman Commission) represents such a consultive process. It was appointed in September, 1990 and has completed Phase I of its mandate, with the publication of *Alberta in a New Canada*, a discussion paper which identifies many of the issues which will have to be resolved if Canada is to continue in its current form. The Task Force warns Albertans that they "must be prepared not only to respond to suggestions for change coming from other parts of the country, but also be ready to advance Alberta's views on the future course of Canada."[32] It exhorts Albertans to be become involved in the public hearings and other activities. While recognizing that these issues are difficult and complex, it concludes that the "debate is about almost everything it means to be a Canadian."[33] The Task Force will begin hearings sometime in late spring. While the time frame for preparation of submissions is short, it is crucial that women's organizations become involved in this consultative process. In addition, there will undoubtedly be other committees created in the coming months which women should look to as public forums in which to express their

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[32]*Alberta in a New Canada*, p. 1.
[33]*Ibid.*

views.[34]

The Spicer Commission (the Citizens' Forum) has attempted to provide Canadians with an informal setting in which to reflect upon their nation and their citizenship. The Forum was, according to the Prime Minister, to provide a time for "soul searching." In its recently released Interim Report, the Commission reports a deep cynicism on the part of Canadians about the state of politics and a strong dissatisfaction with our present political leadership. Further, the Interim Report relates the following sentiments on the issue of citizen involvement and empowerment in the constitutional enterprise:[35]

> Overwhelmingly, participants have told us that they have lost faith in the political system and in its leadership. Anger, disillusionment and a desire for fundamental change is very often the first issue raised in our discussion groups...Canadians are telling us that their leaders must understand and accept their vision of the country - that their leaders must be governed by the wishes of the people, and not the other way around.

Both the Allaire Report of the Québec Liberal Party[36] and the Belanger-Campeau Commission[37] argue that fundamental constitutional change is imperative. Québec will not remain in Canada unless significant change takes place in both the structure and institutions of Canadian

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[34]It is expected that in the Speech from the Throne in May of this year the federal government will establish another Special Committee to consider all proposals for reform, provincial and federal, and develop a package of proposed reforms, which will then form the basis of future negotiations. Public participation will be sought.

[35]Citizens' Forum on Canada's Future, *Theme Report*, March 20. 1981 at 8.

[36]*A Québec Free to Choose*, A Report of the Constitutional Committee of the Québec Liberal Party, January, 1991.

[37]*Report of the Commission on the Political and Constitutional Future of Québec*, March, 1991. The Commission recommended that a referendum on sovereignty be held in Québec, no later than October, 1992. The recommendation apparently has imposed a time-frame within which "the rest of Canada" must define its vision of the country, which then will become the basis for negotiations with Québec.

federalism to recognize the cultural and historic phenomenon of Québec. The Allaire Report calls for a wholesale redistribution of powers between the federal government and the Province of Québec, the effect of which would be massive decentralization.[38]

There appear to be two general questions which Canadians outside of Québec must be prepared to answer: (1) how much restructuring of the present constitutional framework is acceptable to accommodate Québec? and (2) if it becomes apparent that Québec is to separate, what constitutional arrangements do Canadians want to govern that which rémains?

Women have learned that they cannot afford to sit on the sidelines and leave these discussions to others. To do so, is to ensure that their experiences and perceptions will be unheard. The "next round" of constitution-making is particularly important because of the wide range of issues which will be discussed. Everything is on the table; institutions of government such as the Senate and the Supreme Court of Canada, aboriginal rights, the *Charter of Rights and Freedoms*, the amending formula and legislative jurisdiction over matters such as taxation, health care, education, pensions, unemployment insurance, divorce, employment standards, job training programmes, immigration, official languages. And the list could go on and on.[39]

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[38] Decentralization refers to the taking away of legislative powers from the federal Parliament and the granting of these to the provinces. The result of such a process will be a federal government less able to intervene and resolve, on a national basis, a wide range of social and economic problems.

[39] It is interesting to consider this list in comparison with that developed by the National Action Committee in 1980, when it announced that constitutional reform was to be its first priority in 1980. Their list included 15 items, most of which are only now "on the table" for serious consideration. The list was:

1. Entrenchment of the human rights in the Constitution.
2. Indian rights as they relate to native women.
3. Family Law - marriage, divorce, property and civil rights.
4. Economic -- equal pay, maternity leave, child care, UIC, etc.
5. Education -- retraining, skill training.
6. Political -- representation of women in the Senate, on boards

DECENTRALIZATION

The orientation of constitutional discussions so far suggests that greater decentralization is inevitable. A realignment of power between the federal and provincial jurisdictions is a matter that not only Québec, but provinces like Alberta and British Columbia, have called for repeatedly. Women in Alberta will have to decide where they stand on the issue of decentralization of powers to provincial legislatures. Some of the powers likely to be given up by the federal Parliament will be of particular importance to women; for example, limitations upon the federal spending power and jurisdiction over divorce.

Many women have viewed provincial governments as less tolerant and receptive to their claims for equality than the national government. Provincial politicians may be more susceptible to influence by relatively small but vocal and "headline grabbing" groups whose views could only be described as intolerant and extreme. It is more difficult for such groups to gain sufficient support in the federal Parliament or government to influence the creation of policy and programmes. In addition, it may be more practical and efficient for women's groups to direct the bulk of their lobbying efforts to

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and commissions, courts, Lieutenant Governors, Crown.
7. Income security - pensions.
8. Health and welfare
9. Criminal law - abortion
10. Immigration
11. Administration of justice
12. Communications
13. Cultural policy
14. Housing
15. Environment

one government, as opposed to ten. And once the federal government is convinced of the need for a programme or initiative, it can ensure its availability on a national basis.

For example, although the provinces already have significant jurisdiction in the area of health,[40] women may wish to consider whether they should support any attempt to limit the federal spending power, under which the federal Parliament is able to set up the conditions upon which the provinces receive funding to help pay for medicare. These federally imposed conditions prevent provincial governments from, among other things, undermining the principles of universality and accessibility by permitting doctors to extra-bill and arbitrarily de-insuring certain medical procedures.

This issue was raised in a recent case before the British Columbia Supreme Court[41] in which the province attempted to de-insure the medical procedure of abortion, except when there was a significant threat to the mother's life. While the Court decided the case on other grounds, it acknowledged the risk run by the provincial government in instituting such a plan, -- the risk that the challenged regulation might disqualify the provincial medical care plan from federal funding. The spending power provides the federal government with an effective means to ensure the national integrity of its health care scheme, regardless of the predilections of a particular provincial government or government official.

Another area in which women might wish to consider the implications of decentralization is in relation to the jurisdiction over marriage

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[40] Although "health" is not expressly mentioned in the *Constitution Act*, 1867, much of the jurisdiction over it is provincial, as a matter of property and civil rights (92(13)) or as a local concern (92(16)). See: *Schneider v. The Queen* (1982), 139 D.L.R. (3d) 417.

[41] *British Columbia Civil Liberties Association v. British Columbia* (A.G.),[1988] 4 W.W. R. 100.

and divorce, which presently resides with the federal Parliament by virtue of s.91(26) of the *Constitution Act, 1867*. It should be remembered that in 1978, it was recommended that legislative jurisdiction over marriage and divorce be given to the provinces. The main concern for women in such a proposal relates to the creation of inequitable and inefficient provincial variations in the grounds for divorce. Presently, under the federal *Divorce Act*,[42] if one has resided in a jurisdiction for a minimum of one year, it is possible to apply for a divorce upon the ground that there has been a breakdown of the marriage. Marriage breakdown is defined in s.8 of the Act as being established if the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceedings or that the spouse against whom proceedings are brought has committed adultery or treated the other spouse with physical or mental cruelty.

If this jurisdiction were to be granted to the provinces, it is quite likely that different grounds would be available in different provinces. Some provincial governments might be antagonistic to broadly based access to divorce and could take the opportunity to legislatively restrict the grounds on which a divorce would be granted. If other provinces had less restrictive grounds, this would encourage men and women to engage in "forum shopping," but it will be more difficult for women, with their limited mobility, to move to another province to establish residency for the purposes of gaining a divorce. Women's lack of mobility stems from their lack of financial resources and their primary responsibility for child care.

Further, provinces might establish different residency periods before which a divorce could be granted by a court, thereby creating

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[42]R.S. 1985. c. 3 (2nd. Supp.)

provincial "Renos." Again, it would be a woman's misfortune to reside in a province with a lengthy period of residency and, for the reasons mentioned above, it may be significantly more difficult for her to move to another jurisdiction with less restrictive residency requirements.

Further, some fears have been expressed in relation to the growing influence of the "fathers' rights" movement.[43] At various times these groups have suggested legislative changes to create a presumption of joint custody, to require mandatory mediation and to punish those (usually wives) who make "unfounded" allegations of child sexual abuse to gain custody of their children. Currently, in the areas of custody, access, and maintenance, there is divided jurisdiction between the federal Parliament and the provincial legislatures. In the context of divorce, the ancillary or related matters of custody, access and maintenance will be a matter of exclusive federal jurisdiction. In other contexts, for example, in a case of separation before divorce proceedings are commenced, these issues will fall under provincial jurisdiction by virtue of the province's power over property and civil rights. If, through constitutional reform, divorce became a matter of exclusive provincial jurisdiction, provinces could then legislate comprehensively in the area of "the family." Some provincial legislatures may choose to impose a presumption of joint custody and require mandatory mediation in the resolution of family disputes.[44] While it is beyond the scope of this discussion to address the

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[43]See generally: (1989) 3 Canadian Journal of Women and the Law 1 - 324, which is devoted to the issue of women and custody. In particular, Delorey, Ann Marie, "Joint Legal Custody: A Reversion of Patriarchal Power" at 33; Boyd, Susan B., "Child Custody, Ideology and Employment" at 111; Girdner, Linda. K., "Custody Mediation in the United States: Empowerment or Social Control?" at 134 and Pask, Diane E., "The Effect on Maintenance of Custody Sharing" at 155.

[44]Fathers rights groups lobbied the federal government to include a presumption of joint custody in the new *Divorce Act*, enacted in 1985. No presumption was included but the *Act* does require a lawyer to bring to the attention of her client the mediation services available in the community.

growing concerns of women in relation to such trends, an increasing number of commentators now suggest that joint custody may simply perpetuate the influence and domination of men over the lives of women.[45]

The specific subjects of health and divorce are examples of a number of "social welfare" issues which may be affected by the constitutional reform process, and in particular, by a movement toward a greater decentralization. However, there are also arguments to be made in favour of greater local or provincial autonomy in relation to certain aspects of our lives. Indeed, one could suggest in an area such as "the family," that the concerns of the province are not only legitimate but are predominant. The structure of the family and its success or failure, be it in relation to divorce, separation, battered women and children, single parenting, education or adequate, affordable housing, are related concerns which put unique stresses and strains upon the human and financial resources of municipal and provincial governments. Police officers, social workers, teachers and counsellors for battered women and abused children, among others, are all stretched to the limit in ever-increasing attempts to provide some basic support for those going through disruptive and painful personal experiences. A strong argument can be made that these matters are better dealt with by provincial governments, each government having the opportunity to tailor programs to their unique local needs and circumstances. The best way to accommodate this goal may be to provide provincial governments with greater constitutional jurisdiction over taxation, thereby providing the necessary financial resources to provide the social services required to support the modern family, in whatever form it may take.

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[45]See: *supra*, n. 41.

Of course, rather than talk about greater decentralization from the national government to provincial governments, one could also argue in favour of a power shift in the other direction - from provincial governments to the federal government. Although this is not a popular position at the moment, with either the provincial or federal governments, it is one that should not be ignored by women. Indeed, the Horsman Commission in its discussion paper, *Alberta in a New Canada*, raises the question of whether the federal government should be constitutionally responsible for more services, such as health care and education.[46] In areas such as health care, post-secondary education, and the provision of some other social services, arguments based on efficiency and equality may support the reorganization of legislative jurisdiction in a way that would see an increase in the powers of the national Parliament.[47] Some would argue that it is only through such a constitutional reorganization, that we will be able to assure ourselves that everyone has the right to share in, and benefit from, basic services which guarantee a minimum standard of living for all Canadians.

Women in Alberta will have to decide where they believe their interests and needs will be better respected and protected. However, what is of crucial importance is that women acquaint themselves with the arguments in

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[46]While the Horsman Commission avoids making any recommendations in its Report on issues such as decentralization ,waiting to receive public submissions, Premier Getty apparently has no such hesitation. In an article published in the Edmonton Journal, Saturday, April 20, 1991, the Premier was reported as saying that he wants decentralization on the table at the next round of Constitutional talks. "In any new arrangement - if we are able to come to one - I want to make sure all premiers in Canada know Alberta is not going to support one in any way that is going to be a centralization of powers." He continued: "That (centralization) has been the real threat to Alberta over the years. It hasn't been Québec that's been the threat to Alberta."

[47]See, for example, Boadway, R., "Constitutional Design in a Federation: An Economic Perspective" in Canadian Constitutional Options, Business Council on National Issues, January, 1991.

favour of, and against, greater decentralization within the Canadian federation. Only some of the implications have been raised above. It can be predicted, however, that greater decentralization will have a significant effect upon many of the existing programs and initiatives created and funded by the federal government. Many of these are of particular importance to women, considering their position of relative poverty[48] in comparison to men.

ASYMMETRICAL FEDERALISM

Asymmetrical federalism is an expression used to describe a federal structure in which the powers granted to one province are not identical to those granted to others.[49] Under such a model of federalism, it would be possible to grant Québec legislative powers over certain subject matters while not granting the same powers to the other nine provinces. Québec has unique concerns in relation to the maintenance of its cultural and linguistic integrity and, therefore, it might be possible to provide Québec with legislative jurisdiction over subject matters such as language, immigration and, at least, that part of communications dealing with content. Further, Québec might be

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[48]Recent statistics indicate that the average full-time salary for women in Alberta is $20,827 per year compared with $32,005 for men. Further, in Alberta, 73% of all part-time workers are women. Part-time workers usually have few benefits, such as pension plans and are often paid the minimum wage, which in Alberta is $4.50 an hour.

Single mothers and elderly women are particularly vulnerable to poverty. 47.7% of single mothers and 52% of single women over 65 in the Edmonton area, lived at, or below the poverty line in 1985. This is compared with 21.1% and 42.1% for single fathers and males over 65, respectively.

If a woman is divorced or separated, she may expect to suffer an average 30% drop in her income while her husband's income will rise, on average, by 70%. Statistics also indicate that as many as 67% of ex-husbands default on child-support payments.

(This statistical profile of women and poverty is taken from: *Alberta Facts*, No. 8, May, 1990, published by the Edmonton Social Planning Council.)

[49]See for a general discussion of this concept: Milne, David, "Equality or Asymmetry: Why Choose?" in Canada's Constitutional Options, Business Council on National Issues, January, 1991.

expressly exempted from any federal shared-cost programmes in areas such as education, where the subject matter has clear implications for Québec's ability to maintain and promote its distinctiveness. This approach could also exempt Québec from the application of the *Charter of Rights and Freedoms.* Some Québecois view the Charter with hostility, as it appears to elevate the rights of individuals over those of the community. A "rights" document with such an orientation could stand in the way of Québec's desire to enhance and promote its distinct linguistic and cultural identity.

For those who believe in the equality of the provinces, asymmetrical federalism will be an unattractive model for the constitutional restructuring of Canada, since its effect is to create, if not special status, at least a "different" status for one of the component parts of the federation. Canadians, outside Québec, may also be concerned about the fate of their fellow citizens in Québec in relation to the maintenance of basic social services and protection for human rights. As Alan Cairns suggests, asymmetrical federalism will generate two tiers of citizenship - one for the Québecois and one for the rest of Canada.[50]

However, ours has never been a federal system based upon absolute equality among the provinces. Ignoring the obvious geographic and demographic differences of size, population and wealth, our *Constitution* now provides for a degree of asymmetry. For example, s.33 of the *Constitution Act*, 1867 imposes a bilingual legislative and judicial regime upon Québec but not upon other provinces. The right to denominational schools varies from province to province and of course, there is s.33 of the *Charter* which permits a

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[50]Cairns, A. C., "Constitutional Change and the Three Equalities: Citizens, Provinces, Two Nations" in Canada's Constitutional Options, Business Council on National Issues, January, 1991

province to override certain guaranteed rights. Further, there are many examples of administrative agreements between the federal government and individual provinces which permit differences to be accommodated.

A number of variations of asymmetrical federalism have been suggested. For example, Queen's University economist, Thomas Courchene, suggests a model based on two lists of legislative powers: one which would be exclusively federal and the other which would be shared between the federal and provincial governments. Individual provinces would be free to decide which of the powers on the second list they wished to exercise. Those provinces seeking greater decentralization would select more powers from the second list, while other provinces, favouring a stronger federal government would select fewer.

THE STATUS QUO

The *status quo*, leaving the Canadian federal structure in its present form, with its present allocations of powers, is not a viable option. Maintaining the *status quo* will ensure that Québec separates, ultimately leading to a complete reorganization of the federation. Therefore, Canadians outside Québec, despite their apparent desire to maintain the *status quo*,[51] must prepare themselves for a wide-ranging and open-minded debate on the future form of Canada.

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[51] In a recent poll conducted by the Globe and Mail/C.B.C. news, Canadians were asked their views on the re-allocation of powers. The results, as reported in the Globe and Mail on Monday, April 22, 1991 were:

		Québec	Canada
1.	Shift power to provinces	55%	35%
2.	Shift power to federal government	8%	12%
3.	Left as they are	31%	45%
4.	Don't know, not sure	5%	8%

SEPARATION

Just as the *status quo* represents one extreme in the upcoming constitutional negotiations, separation represents another. However, the two are intimately linked, as noted above. Maintenance of the *status quo* will lead to the separation of Québec. Canadians must appreciate this stark reality -- Québec is not "bluffing". If the separation of Québec becomes a reality, then the rest of Canada will have to begin negotiations to redefine that which remains. The further fragmentation of that which remains then becomes a real possibility; for example, Alberta or perhaps Alberta, Saskatchewan and Manitoba together, creating a new political unit.

These proposals and others, which will undoubtedly be made in the months ahead, will force Albertans to fundamentally rethink the structure of Canada. The *status quo* is not acceptable to Québec nor to a number of other provincial governments, including Alberta. A call for renewed federalism now implies the fundamental restructuring of Canada. It is important for women to be part of this debate; women must articulate those values which they wish to see entrenched in the *Constitution;* if they are silent now, their experiences, perceptions and wisdom will play no part in the definition of Canada's constitutional future.

CHAPTER IV

THE CHARTER OF RIGHTS AND FREEDOMS

The adoption of the *Charter*, with its guarantee of gender equality, was an important political victory for many women. They gained a constitutional identity and any threat, perceived or real, to that identity is a cause for major concern. The *Charter* was put in place to help define the relationship between the individual and the state. Many Canadians saw great benefit in constitutionally defining their rights in relation to government; in limiting government in terms of the laws it might pass and the actions it might take. Not surprisingly, a number of provincial governments were more wary of the possible effects of the *Charter*.

The Horsman Commission asks Albertans to reflect upon the ten year history of the *Charter* and consider a number of difficult issues which include: the nature of the changes that have taken place in our system of government due to an entrenched *Charter*; the appropriate role for the legislative and judicial branches of government; the inclusion of additional rights, for example, property rights; and the necessity for s.33, which allows Parliament or a provincial legislature to override or opt out of certain of the guarantees in the *Charter*.

While the Horsman Commission asks Albertans to consider the affect of the *Charter of Rights and Freedoms* on our system of government, it seems unlikely that either the provincial or federal governments wish to have this round of constitutional negotiations dominated by a discussion of individual rights. To begin anew the debate as to what rights should, or should not, be included in the *Charter* will deflect attention from that which many view as the paramount purpose of this round of constitutional negotiations, the re-

allocation of legislative power between the federal and provincial levels of government and the redefinition of federal institutions. Therefore, although as part of the *Constitution* the *Charter* is "on the table," some government officials may not wish to confuse allocation of power issues with rights issues. Any discussion of rights -- who has them, who doesn't, who wants them - will lead to a proliferation of demands from various interest groups within Canadian society to participate in the next constitutional round.

There have been suggestions that certain rights be added to the *Charter*, for example, property rights, foetal rights, social and economic rights. These are all clearly of interest to women. Property is something women generally have less of than men. Presumably, therefore, the protection of property rights would disproportionately benefit men. Further, the inclusion of property might permit corporations to argue that their economic interests are constitutionally protected.[52] In addition, such recognition might place significant limitations upon the provinces' ability to legislate in relation to property and civil rights, presently the main source of provincial legislative power.

An express recognition of foetal rights would place significant limitations upon a woman's right to control her body and the process of reproduction. To grant the foetus constitutional status, independent of its mother, opens the door to the possibility of state supervision of a woman's pregnancy and may provide other interested parties with further means by

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[52]In the *Irwin Toy Ltd. v. Que.* (A.G.) (1989), 58 D.L.R. (4th) 577 the Supreme Court of Canada concluded that the phrase "security of person" in s. 7 of the Charter provided no constitutional protection for a corporation's economic rights. The Court concluded that: "A plain common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights." (p. 633).

which to intervene in, and control, women's lives.[53]

Perhaps the most interesting of those rights suggested for inclusion in a reformed *Charter* are social and economic rights. Presumably, all Canadians would have a constitutional right to those benefits and services which are required for a reasonable standard of living. These might include rights to health care, education, housing and perhaps a guaranteed annual income. The recognition of such rights would go far to improve the disadvantageous living conditions which characterize the existence of many Canadian women and their children.[54]

The recognition of such rights would probably force a long overdue rationalization of the plethora of social welfare programmes initiatives that presently exist at both the federal and provincial levels of government. It might also be that if such rights were included in the *Charter*, women would have less to fear from greater decentralization. Such a constitutional guarantee would obligate the provinces to provide the means to ensure a reasonable standard of living. However, the actual form of delivery could be left to each province to devise, based upon local concerns

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[53]While the Supreme Court has not expressly resolved the issue of whether the phrase "the right to life" in s. 7 of the Charter includes foetal life, a number of recent decisions from the Court suggest that it does not: for example; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Diagle v. Tremblay*, [1989] 2. S.C.R. 530 and *Sullivan and Lamay v. The Queen*, [1991] S.C.J. No. 20.

[54]To suggest that such rights be recognized is not as radical as it might initially sound. For example, the Québec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 45 states that: "Every person in need has a right for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such a person an acceptable standard of living." When the Supreme Court considered the meaning of the phrase "security of person" in s. 7 in *Irwin Toy, supra*, n. 52, it inferred that economic rights as generally encompassed by the term "property" were not included. However, the Court chose not "to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights", thereby leaving the door open to the possibility that s. 7, as it now exists, may guarantee the right to the basic necessities of life. (p. 633).

and needs. One would presume that the provinces could not "opt out" of these rights.

If the *Charter* is up for renegotiation, then s.33, which permits the federal Parliament or provincial legislatures to "opt-out" of certain guaranteed rights, will be the centre of much debate. As mentioned earlier, s.33 was the price paid for provincial agreement to the *Constitution Act, 1982*. It has been invoked only once, apart from Québec, and Prime Minister Mulroney has called for its repeal.[55]

The frequent use of s.33 by the provinces would lead to a "patchwork" of rights across the country, the nature of citizenship varying from province to province. While provincial legislatures have been most circumspect in their use of s.33, there have been few expressions of willingness to give up this constitutional "out" and the section is not likely to be repealed.

As the opposition to the Meech Lake Accord illustrated, any perceived threat to a group's existing *Charter* "stake", will evoke a fierce response. Women may wish to think about proposing changes to the *Charter* to increase their "stake"; however, it is probably more important for women in this round of constitutional negotiations, to ensure that that which they have gained by virtue of the *Charter* is not taken from them, intentionally or unintentionally.

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[55]The Government of Saskatchewan invoked s. 33 in 1986, when it legislated striking dairy workers back to work.

CHAPTER V

THE REPRESENTATION OF WOMEN IN THE PROCESS OF CONSTITUTIONAL REFORM AND FEDERAL INSTITUTIONS

The point has been made in this paper that women have unique experiences and perspectives that should be heard in the process of constitution-making. Therefore, it is important to ensure that women have the opportunity and means to voice these experiences and perceptions. Women continue to fear exclusion from the processes that "count" in constitution-making. The Meech Lake Accord was the result of "executive federalism" - a process which involved First Ministers, who were all male, and a select number of government officials, few of whom were women.

Others who could be expected to play an important role in the process of constitutional reform are MPs, MLAs and Senators. Women continue to be significantly under-represented in the institutions of government. For example, in the House of Commons women represent 13% of the total members; in the Senate 12% and in the Alberta Legislature 15%.

While in the long run it is important to increase the number of women sitting in Parliament and provincial legislatures, in the short-term women must ensure they are heard in the ongoing constitutional reform process. Therefore, women must utilize existing mechanisms for participation, such as advisory councils and the array of action committees and voluntary organizations which exist to represent women's interests. Women, while relative newcomers to the process of constitution-making, have gained valuable experience from their participation in the 1980-82 process, as well as the Meech Lake Accord process. The primary lesson to be taken from these events is that

if women want their experiences to be considered and reflected in the constitution, they must be part of the process.

The process of constitutional reform, the way in which we amend or change our constitution, is receiving a lot of attention from both the public and government. The federal government recently established a Special Joint Committee on the Amending of the Constitution[56] to receive submissions from the public about how they want the process of constitutional reform to proceed. Many of the submissions speak to the strong desire on the part of Canadians to have the opportunity to participate in the reform of their constitution and there is almost universal condemnation of the process that led to the Meech Lake Accord.

Both the federal and provincial governments have learned a valuable lesson from Meech Lake and are seeking ways to involve the public in the ongoing discussions about the future form of Canada. The Horsman Commission is one such endeavour. Public participation may be important at different stages in the process of constitutional reform. The government of Alberta will not develop a final position until the Horsman Commission has "heard from" Albertans. However, once this position is formulated, it is likely that it, as well as those of other provincial governments and the federal government, will be discussed among the First Ministers. The First Ministers may reach an agreement on the content of a reformed constitution. It is hoped that any such proposal would then be subject to further public discussion, before ratification by the federal Parliament and provincial legislatures. If such a process is followed, it will be important for women to ensure that their views

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[56]The Committee, known as the Beaudoin-Edwards Committee, is to report by July 1, 1991. As of April 24, they had heard from 189 witnesses, many of whom have suggested the creation of a constituent assembly.

are heard at both stages. It is to be remembered that after the Meech Lake Accord had been agreed to by the First Ministers, five provinces held no formal hearings. It is important to ensure that the public has input not only into the formulation of Alberta's constitutional position but also into any "final" constitutional position agreed to by the First Ministers.

Currently, there are a number of proposals under discussion in relation to the process which should be followed before final agreement is reached on a new constitution. These are public hearings, of which the Horsman Commission is an example, referenda and constituent assemblies.

The Horsman Commission asks Albertans to consider both referenda and constituent assemblies as possible mechanisms for reform. As the Horsman Commission points out, Canada has had limited experience with national referenda, although Prime Minister Trudeau did recommend that the federal Parliament adopt legislation providing for national referenda and indeed, he had suggested that a national referendum be held on the constitutional reform package adopted in 1982.[57] One presumes that a referendum would be held after a package of constitutional reforms had been agreed to by the First Ministers. Canadians would then be given the opportunity to vote on that package. One national referendum might be held, ten provincial referenda or perhaps a combination of both. In addition, consideration should be given to the protection of certain minority interests; for example, should aboriginal Canadians have the right to their own referendum and the right to veto any constitutional changes that would directly affect them? Further, would a simple majority of voters be sufficient to accept or reject proposed reforms? Would one want to consider "majorities within

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[57]See Horsman at 17.

majorities"; for example, should a majority of voters from Western Canada, Ontario, Québec and Atlantic Canada be required as well as an overall national majority? Also important in any discussion of referenda is the question of the legal effect of such a procedure; unless the *Constitution of Canada* were amended to make the results of such referenda binding upon our elected officials, the results thereof would be merely advisory to government and, therefore, not legally binding upon any government.[58]

The constituent assembly is another means by which to ensure public support for proposed constitutional reforms. Such a process could take a number of forms. A national constituent assembly could be held, in which representatives from all ten provinces and the territories attend and deliberate. An important issue would be the membership of the constituent assembly; should members be selected from elected members of the federal Parliament and provincial legislatures or should special elections be held in each province to elect representatives to the assembly or should there be some combination of election and appointment whereby a certain number of a province's representatives could be directly elected and the remainder could be appointed by the provincial and federal governments? What should the powers of a constituent assembly be: should it meet and propose a package of constitutional reforms or should it simply accept or reject proposed reforms, developed by the federal and provincial governments? For how long would a constituent assembly meet, where would it meet and what would be the effect of any decisions it made? Again, as with referenda, would any decisions made by a constituent assembly be merely advisory to

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[58]The present amending formula does not provide for referenda as a method of amendment. Ratification by provincial legislatures and Parliament is that which is required. See ss. 38 - 49 of the *Constitution Act, 1982*. At most, governments would probably take the results of referenda as an indication of public opinion.

the federal and provincial governments? If the decisions of such an assembly were to be binding and form part of the constitution, it would be necessary to amend the existing formula found in the *Constitution Act, 1982*.[59]

The above-mentioned models by which constitutional reform could take place will be subject to intense debate in the months ahead. Women should be prepared to offer their views to the Horsman Commission on which of these proposed models they feel offers them the best opportunity to be heard. The public hearing process is one with which many women are now quite familiar, as it was used both in 1981 and in the Meech Lake debate. The referendum model will permit each Canadian to offer her or his views on proposed constitutional amendments by direct election. The constituent assembly model will create a representative body of some description. The members of the assembly will be either chosen or elected from previously elected members of the federal Parliament and provincial legislatures or will be directly elected by the public. One might ponder whether the members of a constituent assembly would be any more likely to be responsive to their constituents' concerns than those men and women presently elected to represent us in provincial legislatures and the House of Commons.

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[59]*Supra* n. 58; Also, see the comments of the Premier of Newfoundland, Clyde Wells, in (1991) 2 Const. Forum 69, where he endorses the idea of a constituent assembly or constitutional convention. It appears that Québec will not participate in either a national referendum or constituent assembly. Therefor, the utility of such processes is immediately called into question.

REPRESENTATION IN FEDERAL INSTITUTIONS

The function and form of Canada's federal institutions are likely to be topics for discussion in the up-coming constitutional reform process. The three federal institutions of most relevance are the House of Commons, the Senate and the Supreme Court of Canada.[60] Most discussion will focus on the Senate and the Supreme Court of Canada. Both these institutions were dealt with, at least in part, in the Meech Lake Accord.[61]

The abolition or retention of the Senate will continue to be a contentious issue. If the Senate is to be retained and reformed, then the nature of that reform will become the focus of future discussion. Albertans have figured prominently in the debate surrounding a reformed Senate, many have called for a "Triple E Senate", one which is equal, elected and effective.[62] All three of these concepts are highly contentious: equal representation would ensure that each province had the same number of representatives in the Senate. Some find it unacceptable that Prince Edward Island, with less than 1% of Canada's population should have the same number of representatives in the Senate as Ontario with 34% of Canada's population. An effective Senate will require a detailed consideration of its powers. Should the Senate have the same powers as the House of

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[60]The Horsman Commission does raise the possibility of a system of proportional representation for the House of Commons. (p. 8.)

[61]The Accord provided that where a vacancy occurred in the Senate, the government of the province to which the vacancy related could submit to the federal government a list of names, from which the vacancy would be filled. (s.2). The Accord constitutionally recognized the existence of the Supreme Court and required that three of the nine judges of the Court be from Québec. It also provided that the provincial governments could submit lists of names, from which a vacancy would be filled by the federal government. (s.6).

[62]See generally on Senate reform: *The Canadian Senate: What is to Be Done?* Centre for Constitutional Studies, University of Alberta (1989).

Commons;[63] should it have only a suspensive veto over that done by the House of Commons; should it have a special role to play in relation to certain aspects of Canadian life, for example those matters dealing with the preservation of Canada's linguistic and cultural diversity? Should representation be guaranteed within the Senate to certain groups; for example, should aboriginal peoples and women be guaranteed a minimum number of seats? These are merely some of the difficult questions which will have to be addressed in relation to the reform of the Senate and they are questions on which we can expect disagreement among different interests and regions within the country.

The Supreme Court of Canada is an institution of government which has grown in importance since the adoption of the *Charter of Rights and Freedoms*. The Supreme Court is now deciding highly contentious legal, moral and social issues which directly affect the lives of all Canadians. For example, the Supreme Court of Canada's recent decisions in relation to abortion, Sunday closing laws, and religious exercises and instruction in the schools, have all engendered fierce public debate as to the Court's appropriate role in Canada's system of government.

The work of the Supreme Court of Canada is of particular importance to women, as it undertakes the task of defining the nature of equality rights. Therefore, women need to address the issue of representation on the Supreme Court of Canada.[64] Should the *Constitution* entrench a

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[63]Currently the Senate and House of Commons have identical powers in the law-making process, except for money bills which must be introduced in the House of Commons.

[64]The associated but equally important concern involves funding for litigation. An increase in the number of women judges will only be a partial answer to women's pursuit of equality within the legal system. Without the financial resources to initiate litigation, many issues of concern to women will not be heard by the courts.

requirement that a minimum number of women, for example 4, serve on the Supreme Court? Recent comments by retired Justice Bertha Wilson and Madam Justice McLaughlin would indicate that women's experiences have been largely excluded in the development and application of legal principles. Obviously, judges cannot remove themselves completely from their experiences and values when interpreting and applying the law. There are aspects of women's lives which men find it hard, if not impossible, to understand. Madam Justice Wilson has suggested that many of our legal principles should not be viewed as the product of judicial neutrality or impartiality, but as the product of one dominant perspective, that of men. She has said the following:[65]

> In some areas of the law, ... a distinctly male perspective is clearly discernable. It has resulted in legal principles that are not fundamentally sound and that should be revisited when the opportunity presents itself. Canadian feminist scholarship has done an excellent job of identifying those areas and making suggestions for reform. Some aspects of the criminal law in particular cry out for change; they are based on presuppositions about the nature of women and women's sexuality that in this day and age, are little short of ludicrous.

In two significant decisions of the Supreme Court of Canada, *R. v. Morgentaler*[66] and *R. v. Lavallee*,[67] the judgments of Madam Justice Wilson display an awareness of the realities of women's lives and how they differ from those of men. In *R. v. Morgentaler*, a majority of the Supreme Court of Canada struck down s.251 of the Criminal Code, which dealt with abortion. Madam Justice Wilson made the following comments about the nature of

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[65]"Will Women Judges Really Make a Difference? (1990), 28 Osgoode H.L.J. 507 at 515.
[66](1988) 82 N.R. 1.
[67][1990] 1 S.C.R. 852

abortion and its effects on women:[68]

> This decision (to have an abortion) is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship with others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.
>
> It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.

She continued in the following terms:

> The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men. It has <u>not</u> been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert <u>her</u> dignity and worth as a human being.

In *R. v. Lavallee*, the Supreme Court considered the defence of "battered women's syndrome." The issue before the Court concerned

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[68] *Supra*, n. 65 at 125-126.

whether expert evidence should have been admitted at trial to assist the jury in understanding the psychological dimensions of "battering" and its effects on the accused. The Court concluded that the expert evidence was relevant and that the trial judge had not erred in admitting it. Madam Justice Wilson made the following comments in reaching that decision:[69]

> Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: why should a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals.
>
> ... a woman who comes before a judge or jury with a claim that she has been battered and suggests that this may be a relevant factor in evaluating her subsequent actions still faces the prospect of being condemned by popular mythology about domestic violence. Either she was not as badly beaten as she claims or she would have left the man long ago. Or, if she was battered that severely she must have stayed out of some masochistic enjoyment of it.

Madam Justice Wilson concluded that since the battering relationship is subject to a large number of myths and stereotypes and, therefore, perhaps beyond the understanding of the average juror, that expert evidence was admissible to explain the nature of the syndrome.

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[69] *Supra* n. 66 at 871 - 872

Madam Justice Wilson also had to consider the claim of self-defence made by the accused, Ms Lavallee. In considering whether the accused had reasonable grounds to believe that she could not "otherwise preserve herself from death or grievous bodily harm" except by shooting the deceased, she makes the following comments about the nature of reasonable beliefs:[70]

> If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man."

Comments of this kind are still fairly rare in Canadian jurisprudence[71]. They reflect an understanding of women's lives, and their experiences that surely must be relevant to the interpretation and application of legal principles. The realities of women's lives are sometimes impossible for men to understand. The cases quoted above speak to a growing realization on the part of both male and female judges that the law may not be gender neutral, either in its formulation or its application. Hence, it is important to have women participate in the judicial process so that possible biases can be revealed and understood.

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[70] *Ibid.* at 874.

[71] However, they are becoming more frequent as the courts are made aware of the realities of women's lives. More female judges and lawyers will facilitate this awareness. For a discussion of the role LEAF has played in presenting arguments to the courts based on the experiences of women see Eberts, Mary, "New Facts for Old: Observations on the Judicial Process" in Devlin, Richard, *Canadian Perspectives on Legal Theory* (Carswell, 1991) 467.

Women do make a difference, be it in provincial legislatures, Parliament or the Supreme Court of Canada. Ours is a complex society in which a diversity of experiences and perceptions must be recognized and accommodated. One of the ways to ensure recognition of the differences in the lives of men and women is to guarantee that both men and women are represented adequately in our main institutions of government.

CHAPTER VI

CONCLUSION

This discussion paper began with the proposition that women do have a unique contribution to make to the process of constitutional reform. It concludes with the assertion that women's experiences, in some ways profoundly different than those of men, must be given voice in this process. Women must ensure that they are heard; this is a task that can not be left to others.

The process of constitution-making upon which Canadians are embarking is one of singular importance. The threat to the continued existence of Canada is real. Fundamental changes in our federal system of government are now inevitable. Canadians must begin a conversation with each other, and their political leaders, as to the meaning of Canada and the nature of its fundamental values. This task will require tolerance, patience, good-will, generosity, and an open mind. Women must be prepared to participate fully in this conversation.

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